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Supreme Court, U.S.
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No. 97-646

In The

Supreme Court of the United States

October Term, 1997

DENNY'S, INC.,

Petitioner,

vs.

RONALD K. THOMAS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, during the *prima facie* stage of a failure to promote case, Plaintiff does not have to demonstrate that he at least had the same objective qualifications for the job as the person hired.

2. Whether a mixed motive instruction must be given in a failure to promote case when requested by the Plaintiff, even though the Defendant did not request the instruction, the only defense offered for not promoting Plaintiff was his lack of qualifications, and no direct evidence was presented that the decisionmakers placed substantial negative reliance on an illegitimate criterion.

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REFERENCE TO OPINIONS RENDERED BY THE COURTS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 111 F.3d 1506 (10th Cir. 1997). A copy of the opinion is reprinted at pages A-1 through A-18 of Petitioner's Appendix ("Pet. App."). The judgments and findings of the District Court (Pet. App. A-19 through A-29) have not been reported.

JURISDICTIONAL STATEMENT

The jurisdictional requisites are adequately set forth in the Petition.

COUNTERSTATEMENT OF THE CASE

The first two paragraphs of Petitioner's ("Denny's") Statement of the Case adequately set forth the proceedings at trial. However, Denny's discussion in the third paragraph of its Statement of the Case is almost entirely incorrect.

The Tenth Circuit held that the trial court erred in giving an improper instruction setting forth what Respondent ("Thomas") had to prove in order to establish a *prima facie* case. The Tenth Circuit also held that the trial court erred in refusing to give a "mixed motive" instruction requested by Thomas. The Tenth Circuit's opinion does not conflict with any decisions of this Court or with the decisions of any other Circuits.

Contrary to Denny's Statement, the Tenth Circuit did not rule that Thomas did not have to show during the *prima facie* stage of his case that he at least had the same objective qualifications for the job as the person hired. The Tenth Circuit correctly held that the promotion decisions at issue were based on purely subjective criteria. Further, contrary to Denny's Statement, the Tenth Circuit correctly found that sufficient direct evidence of retaliation by decisionmakers at Denny's was introduced to require the giving of a mixed motive instruction.

COUNTERSUMMARY OF FACTS

In its Summary of Facts, Denny's presents over seven pages of what it considers to be significant facts. Denny's carefully avoids any reference to facts unfavorable to it. Thomas believes that it is important to set forth facts not mentioned by Denny's in its Summary, but Thomas will attempt to confine himself to facts relevant to the decisions concerning jury instructions made by the Tenth Circuit.

Thomas introduced a significant amount of evidence to establish that he was qualified to be promoted to management at Denny's. As indicated in the Tenth Circuit's opinion, Thomas began to work at Denny's in 1978. Although the Denny's District Leaders had the final authority to promote employees to management positions, the General Managers recommended those employees whom they believed were good candidates. Although Thomas was granted interviews with District

Leaders, when he sought promotion to management during the period from 1984 through November 1992, he was never promoted.

Irene Johnson, who was a General Manager at Denny's, testified that she felt Thomas was a viable candidate for promotion to management as early as 1983. She recommended to District Leaders that Thomas be promoted to management on three separate occasions during the period 1987 to 1989.

Masood Kasim was another General Manager who recommended Thomas for promotion to management several times during the 1987 to 1990 period. Kasim testified that one of his reasons for seeking Thomas' promotion to management was the work which Thomas had done as a unit aide for Kasim. The unit aide position was often a stepping stone to management at Denny's, because it involved running the restaurant in the absence of a manager or an assistant manager. Kasim testified that the unit aides were in charge of the restaurant when a manager was not present.

Other persons who worked as Denny's managers, including Al Clement and Shoib Ahmed, also testified concerning Thomas being qualified for a management position and his excellent work and responsibility in the position of a unit aide. Although Denny's contends that the unit aide position was that of a mere "babysitter," Irene Johnson testified that she was commended as manager of a Denny's restaurant for running a very efficient restaurant for one month without any managers – just the use of unit aides – one of whom was Thomas. This testimony demonstrates that, at least in the case of

Thomas, work as a unit aide was tantamount to the work of a manager.

In addition to this massive amount of testimony which would have allowed the jury to conclude that Thomas was qualified to be promoted to management, Thomas himself also testified that he was qualified. He testified that, with one exception, he was better qualified than the non-African Americans who were promoted.

With regard to testimony concerning retaliation by Denny's, the evidence which supports Thomas' retaliation claim is accurately summarized in the opinion. (Pet. App. at A-4).

REASONS FOR DENYING REVIEW

I. The First "Question Presented for Review" Is Not Raised By The Tenth Circuit's Opinion.

Denny's submits the following as its first "Question Presented for Review":

> Whether, during the *prima facie* stage of a failure to promote case, Plaintiff does not have to demonstrate that he at least had the same objective qualifications for the job as the person hired.

This question cannot be a basis for review on certiorari here because the Tenth Circuit never held that a plaintiff does not have to demonstrate that he at least had the same objective qualifications for the job as the person hired. Denny's is therefore asking this Court to grant certiorari to review a purported "holding" which, in fact, never existed.

The Tenth Circuit was very clear in stating that the qualifications for a management position at Denny's were purely subjective. The opinion states:

> In the instant case . . . the qualifications at issue were purely subjective. As Denny's conceded in oral argument, it had no posted objective criteria that were applied across the board to all candidates for promotion.

Pet. App. at A-7.

Denny's does argue, albeit incorrectly, that there were objective qualifications. Even if Denny's were correct with regard to this point, it would not salvage its question presented. The Tenth Circuit's view as to objective qualifications was that the qualifications at issue were subjective, not objective. The Circuit never held that, assuming that objective qualifications were at issue, Thomas did not have to show that he had at least the same objective qualifications as the person hired.

The simple answer to Denny's first "Question Presented," therefore, is that it is not presented in this case. If it is necessary to present anything else to show that Denny's is wholly incorrect in presenting its first "Question Presented," it is only necessary to point to *EEOC v. WilTel, Inc.*, 81 F.3d 1508 (10th Cir. 1996), which was cited by Denny's in its Petition. When confronting actual objective qualifications which were posted by the employer concerning a position, the Tenth Circuit said, "It is undisputed that [plaintiff] did not possess the posted minimum qualifications of two to four years of customer service/ telephone experience . . . " *WilTel* at 1515. Based upon the

failure of plaintiff in *WilTel* to meet these *objective* requirements, the Tenth Circuit concluded that she was not qualified for the position. Therefore, contrary to Denny's position, it is evident that the Tenth Circuit requires employees seeking promotion to prove that they have truly objective qualifications in situations in which those qualifications are actually required by an employer.

II. The Tenth Circuit's Opinion Does Not Conflict With Decisions of This Court or Any Other Circuit Court And Correctly Follows *Kenworthy v. Conoco, Inc.*, 797 F.2d 1462 (10th Cir. 1992) In Concluding That The Trial Court's "Qualified Applicant" Instruction Was Erroneous.

The "Qualified Applicant" instruction given by the trial court required Thomas to prove, as part of his *prima facie* case, that " . . . he was at least as well qualified for the position as the person hired instead of him." The Tenth Circuit, in its opinion hereby, relied on *Kenworthy* in concluding that the "Qualified Applicant" instruction was erroneously given.

In the case at bar, Denny's argued that Thomas was not "qualified" for promotion based upon his purported failure to meet certain subjective criteria. As the opinion notes, such subjective criteria are "particularly easy for an employer to invent in an effort to sabotage a plaintiff's *prima facie* case and mask discrimination." Pet. App. at A-6, *citing Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1005, n.8 (10th Cir.), *cert. denied*, 116 S.Ct. 2500 (1996). Therefore, the opinion concludes that the employer's subjective reasons for determining lack of "qualifications" are not

properly considered at the *prima facie* stage. Pet. App. at A-6.

Denny's does not challenge the Tenth Circuit's conclusion that subjective reasons should not be considered at the *prima facie* stage. Instead, Denny's argues that Thomas did not have the same "objective qualifications" as those who were promoted. In reality, there were no "objective qualifications". Having conceded before the Tenth Circuit that there were no posted objective qualifications for the position for which Thomas applied (Pet. App. at A-7), Denny's now seeks to ignore this admission and argue before this Court that there were really objective qualifications after all. Assuming, for the sake of argument, that objective qualifications existed, if they were not posted, and if they were not applied across the board to all applicants, how can they truly be called "objective"?

On page 16 of its Petition, Denny's sets forth certain purported "objective qualifications" of various persons promoted by Denny's. These "objective qualifications" include college degrees or various amounts of college credits and completion of a developmental packet ("UPP"). Denny's misses the point. Denny's does not refer to any evidence in the record which indicates that Denny's *required* any amount of college hours or the completion of the UPP for promotion to management. Tom Taylor, a Regional Human Resources Manager for Denny's, admitted that there was no requirement that a UPP be completed prior to promotion. (Respondent's Appendix at A-1).

Throughout its Petition, Denny's misuses the terms "objective qualifications" and "objective job requirements." Just because something is "objective" does not mean that it is a "qualification" or a "requirement." Thomas would agree, for example, that completion of six college credit hours is an "objective" fact. However, because college hours were never required for promotion at Denny's, completion of those hours would neither be an "objective qualification" nor a "requirement."

Denny's also presents the argument that the trial court, in the instruction rejected by the Tenth Circuit, limited the jury's consideration to "objective qualifications" because one sentence of the instruction says, "You should consider evidence concerning the education, training or experience necessary to perform the job."

There is absolutely nothing in the instruction directing the jury *not* to consider factors other than education, training and experience. The jury obviously could have considered testimony as to purported facts which even Denny's admits were subjective (poor interviewing and communication, lack of initiative).

Denny's argument, however, suffers from a more fundamental flaw. Denny's claims that "education, training or experience" are objective job requirements. Thomas would acknowledge that they *can* be in certain situations. An employer can, for example, have a corporate policy which provides that all managers shall be college graduates. Denny's obstinately ignores the fact that it had no such policy. Denny's had no minimum

education requirements, no minimum training requirements, and no minimum experience requirements for promoting employees to management.

Denny's also ignores the fact that Thomas was not only repeatedly recommended for promotion by General Managers (Pet. App. at A-3 and A-4), he also was repeatedly interviewed by District Leaders. (Pet. App. at A-4). If Thomas truly lacked some "objective" qualification, surely he would have been told this and would not have been repeatedly interviewed.

Denny's views with alarm the possibility that an applicant would be able to establish a *prima facie* cause by simply saying, "I'm qualified." (Petition at 17). Denny's apparently wants to ignore the facts in this case, in which members of Denny's management were constantly indicating to other members of Denny's management that Thomas was qualified by recommending him for promotion to management. (Pet. App. at A-3 and A-4).

In addition to disagreeing with the Tenth Circuit's analysis of the facts in the record, Denny's also disagrees with the Circuit's analysis of the "Qualified Applicant" instruction. Denny's claims that this instruction did not direct the jury to consider the employee's subjective business reasons at the *prima facie* stage. Denny's also states that " . . . there is absolutely nothing in the record even to suggest that the jury considered subjective job requirements at the *prima facie* stage of the case." (Petition at 13).

Denny's is incorrect. The instruction clearly allowed the jury to consider the subjective criteria, and Denny's presented much evidence at trial which was subjective even under Denny's definition and which Denny's

claimed supported its contention that Thomas simply was not "qualified" for a management position. (Pet. App. at A-4). All of this testimony was based on Denny's subjective criteria for promotion. For Denny's to present all of that evidence and then claim that the jury probably did not consider it for purposes of determining whether Thomas was "qualified" at the *prima facie* stage is contrary to logic.

Denny's argues that some of the language in Thomas' requested instruction relating to *Kenworthy* was redundant. As stated in the Petition, "Specifically, Thomas' counsel wanted the trial court to instruct the jury that Thomas could establish that he was qualified for promotion through his own testimony and the testimony of others." (Petition at 18). Thomas submits that this "redundancy" argument is premature and wholly inappropriate in a petition for a writ of certiorari.

The Tenth Circuit's opinion does not set forth the exact language which the trial court is to use when it instructs the jury on remand. Although Thomas certainly hopes that the trial court will use his requested instruction *in toto*, the trial court must make the ultimate decision as to what language will be most appropriate in light of the Tenth Circuit's opinion. In short, Denny's argument is made to the wrong court.

III. The Opinion Is Not In Conflict With Decisions Of This Court Or With Decisions Of Other Circuit Courts Regarding When A Mixed Motive Instruction Must Be Given.

Denny's argument concerning the "mixed motive" instruction would be appropriately called the "magic words" argument. If ever there were a case in which a jury could find that an employer made statements directly reflecting a retaliatory attitude, this is the case.

Thomas filed a discrimination complaint with the Oklahoma Human Rights Commission in 1986. Irene Johnson, General Manager at Denny's, testified that when she brought up Thomas' name to District Leader Reynolds for promotion, Ms. Reynolds stated that they had a problem with Thomas, namely his suit against Denny's. When Ms. Johnson mentioned Thomas' promotion to Mr. Agorichas (with Denny's Human Relations Department), he too mentioned that Thomas had a suit against Denny's. District Leader Rapier told Ms. Johnson that they would never allow Thomas to become a manager because he had sued Denny's. Denny's General Manager Masood Kasim testified that he told District Leader Darweesh that he wanted to take Thomas as a manager and asked why he had not been promoted. Darweesh stated: "Would you promote somebody who has sued?" (Pet. App. at A-4).

In the face of all this direct evidence of retaliation, Denny's contends the evidence was insufficient to justify a mixed motive instruction because no one in "upper management" used the magic words: "Thomas will not be promoted because he filed a discrimination complaint."

Denny's argument concerning "upper management" only serves to confuse the issue. Ms. Irene Johnson's testimony at trial established that the District Leaders had the final authority to promote Thomas (Respondent's Appendix at A-3), and the three District Leaders making the statements set forth above had the authority to promote Thomas at the time they made the statements. Because the statements were made by the persons with authority to make the promotion decisions, the issue of what was or was not done by persons further up in Denny's corporate hierarchy is of no consequence.

Therefore, Denny's sole argument with regard to the "mixed motive" instruction issue is that the District Leaders did not use the "magic words." Denny's argument was emphatically rejected by the Second Circuit in *Ostrowski v. Atlantic Mut. Ins. Companies*, 968 F.2d 171, 181 (2nd Cir. 1992). *Ostrowski*, in turn, was relied upon by the Tenth Circuit in its opinion. *Ostrowski* quotes from *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1185 (2nd Cir. 1992), as it rejects the argument Denny's presents here:

> Strictly speaking, the only "direct evidence" that a decision was made "because of" an impermissible factor would be an admission by the decisionmaker such as "I fired him because he was too old." Even a highly probative statement like "You're fired, old man" still requires the factfinder to draw the inference that the plaintiff's age had a causal relationship to the decision. But juries have always been allowed to draw such inferences.

Ostrowski at 181.

The Second Circuit in *Ostrowski* went on to reaffirm its conclusion in *Tyler* that a plaintiff may prove that the discriminatory *animus* was a motivating factor through either direct or circumstantial evidence. *Ostrowski* at 181-182. The Second Circuit in *Ostrowski*, and the Tenth Circuit here have rejected the "magic words" argument. Denny's does not cite any opinion which accepts the "magic words" argument.

Most importantly, this Court has never embraced the notion that any "magic words" are required to entitle a plaintiff to a mixed motive instruction. Although Denny's cites *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), Denny's also candidly acknowledges that in *Price Waterhouse*, "This Court made clear that the burden shifting threshold a plaintiff must cross is proof that the forbidden *animus* was at least one of the motivating factors in the employment decision." Petition at 20.

The question here is whether that proof be by "direct evidence" or whether it can be by circumstantial evidence which shows a direct intent to discriminate. There is no hint in *Price Waterhouse* that proof that the forbidden *animus* was a motivating factor cannot be presented by circumstantial evidence. Logically, the "direct evidence" language relates to proof of actual *animus* as opposed to establishment of *animus* through inference as approved by this Court in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Price Waterhouse itself illustrates the feeble nature of Denny's "magic words" argument. Many of the facts

considered by this Court in *Price Waterhouse* to be evidence of discriminatory *animus* would not pass muster under Denny's "magic words" test. There is no evidence that any agent of the defendant in *Price Waterhouse* ever expressly stated that the plaintiff was not promoted because she was a woman. Instead, this Court concluded that a mixed motive instruction should have been given because of statements which were made by persons in the decisionmaking process. For example, plaintiff was described as being "macho" and "overcompensat[ing] for being a woman." Strictly speaking, this was not "direct evidence" (as opposed to "circumstantial evidence") of intentional employment discrimination. It was, however, "direct evidence" of *animus* as opposed to evidence of discrimination based upon the inferential analysis in *McDonnell-Douglas*.

For some reason, Denny's cites *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995). *Fuller* provides strong support for Thomas, since it expressly follows *Ostrowski* and clarifies what the "direct evidence" requirement really means.

Fuller first follows *Ostrowski* by pointing out that not all evidence probative of discrimination will entitle a plaintiff to a mixed motive charge. *Fuller* then explains why the courts impose such a limitation, "Otherwise, any plaintiff who is able to establish a *prima facie* showing in a pretext case would qualify for a mixed motive instruction, conflating the two categories of cases and subverting the Supreme Court's efforts to distinguish the two theories. (Citations omitted)." *Fuller* at 1142. This language makes it clear that the inference of discriminatory intent envisioned in *McDonnell-Douglas* is not enough to

qualify for a mixed motive instruction. *Fuller* cites with approval *Scheininger v. Des Moines Water Works*, 925 F.2d 1100, 1101 (8th Cir. 1991) in which the Eighth Circuit stated, "Simply because a discriminatory reason might be inferred from a *prima facie* case does not mean that a mixed motive case exists."

Finally, citing *Ostrowski* with approval, the *Fuller* court stated, "What is required instead is evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision." *Id. Fuller* therefore makes it clear that the "direct evidence" language in *Price Waterhouse* simply means evidence, whether direct or circumstantial, which reflects the alleged discriminatory attitude directly and bears directly on the contested employment decision. Because it follows *Ostrowski*, it is evident that *Fuller*, like *Ostrowski*, rejects the "magic words" argument.

Denny's also relies on *Walden v. Georgia-Pacific Corp.*, 1997 WL 597439 (3rd Cir. Del. 1997) (citation of 1997 WL 584552 provided by Denny's has been superseded). Not only does *Walden* fail to support Denny's "magic words" argument, it also points out that "direct evidence" in the context of employment discrimination does not indicate that circumstantial evidence is not acceptable. The *Walden* court stated:

> In point of fact, the term "direct evidence" is somewhat of a misnomer, for we have held that certain circumstantial evidence is sufficient for a mixed motive instruction, if that evidence can "fairly be said to reflect" the alleged unlawful basis for the adverse employment decision.

[*citing Hook v. Ernst & Young*, 28 F.3d 366, 374 (3rd Cir. 1994)].

The comment by the *Walden* court that a mixed motive instruction is warranted only when the evidence is sufficient to permit the factfinder to infer that a discriminatory or retaliatory attitude was more likely than not a motivating factor in the employer's decision certainly provides no impediment for Thomas. Here there was plentiful evidence from which the jury could have reached such a conclusion as to discrimination, retaliation, or both.

Although *Mooney v. Aramco Services Co.*, 54 F.3d 1207 (5th Cir. 1995) does not discuss *Ostrowski*, it provides no indication that the Fifth Circuit differs from the *Ostrowski* opinion with regard to the evidence needed to support the giving of mixed motive instructions when requested by plaintiff. *Mooney* provides no support for Denny's "magic words" argument. *Mooney* provides the Fifth Circuit's definition of "direct evidence" in the context of employment discrimination:

> In *Brown v. East Mississippi Electric Power Ass'n*, 989 F.2d 858 (5th Cir. 1993), we defined direct evidence in the employment discrimination context: "[d]irect evidence is evidence which, if believed, proves the fact [of discriminatory *animus*] without inference or presumption.

Mooney at 1217.

In *Brown v. East Mississippi*, plaintiff's supervisor, one Pippen, repeatedly used racial slurs when referring to plaintiff. Pippen also participated in the disciplinary

employment decisions concerning which plaintiff complained. *Brown* at 861. However, there was no evidence in *Brown* that Pippen, or anyone else, testified that the employer disciplined plaintiff because of his race. Discriminatory *animus* was established by the racist remarks, even though the "magic words" were lacking. Because there was no testimony directly linking the racial *animus* with the disciplinary decision, the evidence was circumstantial. It seems clear that the Fifth Circuit requires proof of discriminatory *animus* by what would be commonly called direct evidence, but that the Fifth Circuit would allow the connection between *animus* and the employment decision to be established by circumstantial evidence. In this respect, the Tenth Circuit's Opinion is in accord with the Fifth Circuit because there was clearly direct evidence of discriminatory (retaliatory) *animus* by decisionmakers against Thomas.

In *Brown*, the statements made by a decisionmaker disclosed a discriminatory *animus* toward African-Americans. In *Price Waterhouse*, statements by decisionmakers disclosed a discriminatory *animus* toward women. Here, the statements by decisionmakers disclosed a discriminatory/retaliatory *animus* toward Thomas for seeking relief for alleged racial discrimination. Just as in *Brown* and *Price Waterhouse*, the evidence of the *animus* is direct.

In *Mooney*, the only purported errors relating to instructions raised on appeal were the failure to give a mixed motive instruction and the failure to give a pattern and practice instruction. Unlike the present case, there was no challenge to the *McDonnell-Douglas* inference

instructions. The analysis of the evidence of discrimination in *Mooney* is clearly distinguishable from the evidence here, as shown below. However, even if it were not, the Fifth Circuit noted that in *Mooney*, the absence of a mixed motive instruction could have never changed the result because a jury (properly instructed on the *McDonnell-Douglas* elements) "plainly did not believe [plaintiffs'] testimony under the lower 'inferential evidence' standard employed in the *McDonnell-Douglas* analysis." *Mooney* at 1219, n.17.

The Fifth Circuit in *Mooney* did conclude that various statements were not sufficient to constitute "direct evidence" under *Price Waterhouse*. These statements, however, were quite different from the statements made by the Denny's District Leaders.

Two of the statements in *Mooney*, even though they were made by decisionmakers, were not specifically directed at a plaintiff. Thim's supervisor told him, "If I can replace an expensive American expat with a younger and cheaper Brit, I can save the company a lot of money." Unlike the statements of the Denny's decisionmakers, which were specifically directed at Thomas, Thim's supervisor merely made a "generic" statement which was not directed specifically at Thim. The same is true of the decisionmaker's statement regarding Mooney which was, "They're going to get rid of the older employees with the higher salaries." The statements relating to Olson and Williams, while referring to age discrimination, were not made by the decisionmakers and, as the Fifth Circuit pointed out, were merely speculation.

In arguing that *Mooney* indicates that the Tenth Circuit reached the wrong result here, Denny's is comparing apples to oranges. Denny's fails to show that the Fifth Circuit, or for that matter *any court* has applied a different legal standard to the mixed motive instruction issue than did the Tenth Circuit here.

Even if Denny's could somehow show that the *Mooney* opinion establishes that the Fifth Circuit would have reached a different result than the Tenth Circuit concerning the mixed motive instruction (and Denny's has fallen far short of such a showing), this still would provide no basis whatsoever for granting certiorari. The most that Denny's would then be able to establish would be that the Fifth Circuit and the Tenth Circuit differ as to whether the specific facts here constitute direct evidence of discriminatory *animus*.

As final authority for its mixed motive argument, Denny's relies on *EEOC v. WilTel, Inc.*, 81 F.3d 1508 (10th Cir. 1996) and other Tenth Circuit cases cited therein. Leaving aside the question of whether conflicting Tenth Circuit cases would provide a valid basis for certiorari, there is no conflict between the Tenth Circuit cases cited by Denny's and the present case.

In *WilTel*, plaintiff was an evangelical Christian whom WilTel refused to hire. Sometime after the decision was made not to hire plaintiff, one of the persons involved in interviewing plaintiff stated, "I don't like [plaintiff] because she is into all that Jesus shit and she doesn't fit in." *Id.* at 1513. Although the Tenth Circuit concluded that this was not direct evidence of discriminatory refusal to hire, it did so because the evidence did not

support the finding that the person making the statement played a dominant role in the interviewing process. Here the evidence was uncontradicted that the District Leaders had the final authority to decide whether to promote Thomas.

In *Heim v. State of Utah*, 8 F.3d 1541, 1546 (10th Cir. 1993), plaintiff argued that there was direct evidence of discriminatory intent because of one comment made by her supervisor. In an angry outburst, the male supervisor said, "I hate having fucking women in the office." *Heim* at 1546. The Tenth Circuit simply agreed with the trial court's holding that the remark was "inappropriate" and directed toward women in general. This kind of generic statement is far removed from the specific statements pertaining to Thomas and his retaliation claim in the case at bar.

Ramsey v. City and County of Denver, 907 F.2d 1004, 1008 (10th Cir. 1990) provides no support for Denny's. Although a man in a supervisory position over plaintiff testified that he felt women were better suited for some jobs than for others, there was no evidence that he acted on his discriminatory beliefs. Once again, these statements were generic and did not focus on plaintiff.

With regard to *Furr v. AT&T Technologies, Inc.*, 824 F.2d 1537 (10th Cir. 1987), four plaintiffs prevailed at trial, while three did not. The unsuccessful plaintiffs appealed, arguing that they had presented direct evidence of intentional age discrimination, but the Tenth Circuit disagreed. The opinion does not provide sufficient details to establish whether the discriminatory statements were made by decisionmakers and whether or not they focused on any

of the unsuccessful plaintiffs. Certainly *Furr* provides no support for an argument that the *Furr* court would have reached a different result than did the Tenth Circuit in this case.

IV. The Tenth Circuit Did Not Depart From The Accepted And Usual Course of Judicial Proceedings.

Although Denny's makes half-hearted statements indicating that the opinion conflicts with decisions of other Circuit Courts of Appeal (Petition, pp. 19, 30), Denny's makes no serious attempt to argue this point. As noted above, the Tenth Circuit's analysis as to the legal standard to be applied does not differ from that of other circuits. Denny's tacitly recognizes this, since its only significant argument as to why this Court should accept certiorari is based on the Tenth Circuit's purported "departure from the accepted and usual course of judicial proceedings."

In its argument that the Tenth Circuit has departed from the accepted and usual course of judicial proceedings, Denny's complains that the opinion fails to include various facts which Denny's deems important. In view of the fact that the thorough opinion encompasses 14 pages in Petitioner's Appendix, Thomas submits that this Court should reject Denny's bizarre argument that the opinion is too short. Surely this Court has no desire to direct the Courts of Appeal to write more lengthy opinions, merely to include an exhaustive statement of the positions of both sides.

In reality, the section of Denny's Petition purportedly arguing that the Tenth Circuit has "departed from the accepted and usual course of judicial proceedings" is merely a continuation of Denny's *modus operandi* in its Tenth Circuit briefing. Denny's seeks to have this Court focus on all the facts (or purported facts) which favor Denny's and ignore the facts which favor Thomas. Such a blatant attempt at ignoring the role of the factfinder should be given short shrift by this Court, which doubtless has more important tasks at hand than wading through evidentiary minutia. In fact, this portion of Denny's Petition would be appropriate only in an appeal in which Denny's was asserting that the verdict was against the weight of the evidence.

Denny's complains that the Circuit ignored evidence that Denny's hired other African-American managers. The issues in this case were whether Thomas was discriminated against or retaliated against. Thomas did not rely on statistical evidence. Evidence of promotion of or offers of promotion to other African-Americans, while it may well be relevant at the trial of a discrimination claim, has nothing to do with the issues involved in this petition for certiorari.

Most of the other points raised by Denny's in this section of its Petition involve matters which obviously can only be considered by the factfinder. Thus, Denny's laments that the Tenth Circuit did not focus on factors which might impeach the opinions of Denny's managers Irene Johnson and Masood Kasim insofar as they believed Thomas was qualified for promotion. Denny's goes on to complain that testimony of various witnesses purportedly favorable to Denny's was ignored by the Tenth Circuit.

Once again, this testimony, while proper for consideration by the trier of fact, has absolutely nothing to do with the issues presented here.

Finally, although Denny's must acknowledge (and has acknowledged) that Thomas properly objected to the Qualified Applicant instruction at trial, Denny's argues that Thomas objected for the first time to the last sentence of the instruction in his Reply Brief in the Tenth Circuit. Apparently, Denny's is contending that, although Thomas properly objected to the instruction at trial, the objection was not "timely, clear and specific" because it did not focus specifically on the last sentence of the instruction.

Denny's ignores the fact that, pursuant to the trial court's request, Thomas, after objecting to the Qualified Applicant instruction, proposed an instruction which Thomas deemed suitable. (Pet. App. at A-3). That proposed instruction did not include the last sentence of the Qualified Applicant instruction. In addition, Thomas' counsel specifically cited *Kenworthy* to the trial court, making it abundantly clear that the Qualified Applicant instruction would allow Denny's to raise its proffered nondiscriminatory reasons for not promoting Thomas to prevent him from establishing a *prima facie* case.

For all of the above reasons, the petition should be denied.

Respectfully submitted,

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APPENDIX

* * *

[p. 1197] Q. You told us earlier that he had some no [sic] response.

A. That's correct.

Q. And you're telling the jury, sir, that you wanted to provide him an opportunity; is that right?

A. Yes, sir.

Q. Sir, he had just been made employee of the year of that unit. Are you aware of that?

A. Yes.

Q. Tell the jury, please, what is required to be made an employee of the year.

A. Employee of the year is, again, a commendable award. It is an award directed at a unit level or an hourly employee. It can be a cook, it can be a server or a waitress. It can be a bus person or one of our hostesses or hosts. But it is directed at characteristics of a unit level employee and does not necessarily – or is not characteristic of anything in the management ranks.

Q. Sir, there's no requirement that a developmental packet be completed prior to promotion, is there?

A. No, sir.

Q. And, sir, you know Mr. John Lynch, don't you?

A. Yes, sir.

Q. Mr. John Lynch came to you asking for Mr. Thomas to just be given the chance to be put into MIT and you told him it's in legal hands, didn't you?

* * *

[p. 733] Denny's management, did it not?

A. Yes, it did.

Q. The college courses that you took, I understood that you said one today, but I believe previously you said two courses at Mason City?

A. At Mason City I took one small business course.

Q. And you took another one somewhere, did you not?

A. After I was in place with Denny's, I took some night courses out at TJC here in Tulsa.

Q. What year were those?

A. Off and on, let's see, from '86 to '90, '87 to '90.

Q. Do you believe that the courses that you took were very valuable for you and helped you in your work?

A. Education is always valuable.

Q. We've had testimony from Ahmed, Mr. Kasim, and they spent a lot of time at Rogers State College and other places trying to help them get into management. Would you agree that's a good idea and a good thing to do?

A. Yes.

Q. And when you came – by the way, you never hired, pardon me, you never promoted anybody in the past; isn't that correct? Never promoted anybody into management at all in your entire experience?

A. No, the final decision was always the district manager's.

Q. So, the answer to my question, you've never been in

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